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553019—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 342

JACKSONVILLE PAPER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Vol. I, 104–114)[1] is not yet officially reported. The findings of fact, conclusions of law, and order of the National

[1] The printed record for purposes of the petition for certiorari consists of: (1) the printed "transcript of record" in the court below, containing the complaint, decision of the Board, opinion and decree of the court below, and other papers, which is referred to herein by the designation (Vol. I); and (2) the "transcript of testimony" printed as an appendix to petitioner's brief in the court below, which is referred to herein by the designation (Vol. II).

Labor Relations Board (Vol. I, 84–100) are reported in 46 N. L. R. B. 902.

JURISDICTION

The decree of the court below (Vol. I, 114–116) was entered on August 9, 1943. The petition for a writ of certiorari was filed on September 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether there is substantial evidence to support the findings of the Board, which were sustained by the court below, that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act, and discriminated in regard to the hire and tenure of employment of one Henry Soriano in violation of Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 9.

STATEMENT

Upon the usual proceedings, the Board, on January 9, 1943, issued its findings of fact, conclusions of law, and order (Vol. I, 84–100). The

pertinent facts, as found by the Board, and shown by the evidence, may be summarized as follows:[2]

On January 20 or 21, 1942, William Mixson, the manager of petitioner's Miami branch, was visited by a Union[3] representative who requested him to recognize the Union as the bargaining agent of the truck drivers, helpers, and warehouseman employed at this branch (Vol. I, 88; Vol. II, 49–52). On the afternoon of the same day, Mixson interrogated one of the truck drivers about the union campaign and got him to admit that he was a member. Mixson then disparaged the benefits employees could expect to gain from union membership, and characterized the leaders of the Union as a "bunch of racketeers." (Vol. I, 88; Vol. II, 87–88.) About the same time, Supervisor Bauer[4] asked employee Henry Soriano whether he had joined the Union (Vol. I, 88–89; Vol. II, 99). A few days later, Bauer told employee Robert Aaron that Mixson believed him to be one of the "ring leaders" in the Union, and

[2] In the following Statement, the references designated by the symbol (Vol. I), and preceding the semicolon, are to the Board's findings, and the succeeding references, designated by the symbol (Vol. II), are to the supporting evidence.

[3] Motor Transport and Allied Workers, Local No. 400, C. I. O., which at the time had obtained the adherence of 8 of the 9 or 10 eligible employees then employed at Miami by petitioner (Vol. I, 87–88; Vol. II, 43–45, 47, 67–82, 114–115).

[4] Bauer's title was "shipping clerk," but he was admittedly a supervisory employee, having charge of the truck drivers and warehousemen at Miami, and possessing the power to hire and discharge (Vol. I, 88; Vol. II, 12–14, 134).

that certain other employees had been discharged and threatened with discharge because the management considered them "labor agitators" (Vol. I, 89–90; Vol. II, 62–65, 90–91).

The Board found that petitioner, by expressing to its employees hostility to the Union, sought to induce the employees to withdraw from the Union (Vol. I, 89); and further, that petitioner, by disparaging the Union, inquiring whether its employees belonged to it, and by attempting to induce them to withdraw therefrom, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (Vol I, 90).

Henry Soriano was hired by petitioner on or about January 13, 1942, as a part-time worker (Vol. I, 93–94; Vol. II, 102–103). A few days later, Supervisor Bauer gave him a regular assignment as a truck driver and told him that if his work was satisfactory he would be given permanent full-time employment in that capacity (Vol. I, 94; Vol. II, 140, 96). Soriano was assigned to drive a truck previously driven by one Thompson, a regular full-time driver who had, at about this time, left petitioner's employ (Vol. I, 94; Vol. II, 45–46, 95–96, 107). During the week ending January 24, 1942, during which Soriano drove the truck steadily for 56 hours (Vol. I, 94; Vol. II, 47–48, 96, 106–108), his work was not criticized at any time (Vol. I, 95; Vol. II, 101).

On January 20, in the meantime, Soriano had joined the Union (Vol. I, 94; Vol. II, 70, 71). On January 21 (which was either the same day, or the day following that on which the Union requested petitioner to recognize it, *supra,* p. 3), Bauer asked Soriano whether he had become a member of the Union, and the latter replied in the affirmative (Vol. I, 94; Vol. II, 99). A few days later, on January 24, Bauer told Soriano that "business had fallen off a little bit" and that he was therefore going to "lay up" the truck (Vol. I, 94; Vol. II, 96–97). Instead, however, the truck continued to be driven, but by another employee (Vol. I, 94; Vol. II, 149–150). Thereafter, Soriano was returned to intermittent work, including on one occasion, truck driving, until February 7 (Vol. I, 94; Vol. II, 131–132, 46–47). He has not worked for petitioner since that time (Vol. I, 94; Vol. II, 46–47).

On several occasions, Soriano sought an explanation from Bauer and Manager Mixson as to why he had been deprived of regular work as a truck driver, and as to whether he "had a chance to get back on as a steady driver," but these complaints were invariably ignored or evaded (Vol. I, 95; Vol. II, 98). Finally, Bauer declared, "Well, you had your chance to get on steady, but, since you joined the Union, and Mr. McAllister [5]

[5] McAllister was a Conciliator of the United States Department of Labor who was attempting to assist the Union and petitioner to reach an agreement (Vol. I, 91; Vol. II, 52,

called Mr. Mixson and told him that you could not be fired, well, that let you out. You can't get back in steady" (Vol. I, 95; Vol. II, 99).

The Board found that the real reason for denying Soriano steady employment is found in Soriano's admission to Bauer that he had joined the Union, and in Bauer's statement to Soriano that, since the latter had joined the Union, and McAllister had intervened with Mixson in his behalf, Soriano could not "get back in steady" (Vol. I, 96).

Accordingly, the Board found that petitioner had discriminated in regard to the hire and tenure of employment of Henry Soriano, thereby discouraging membership in the Union, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (Vol. I, 96).

Upon findings that the petitioner's conduct as above summarized constituted unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (Vol. I, 97–98), the Board ordered petitioner to cease and desist from the unfair labor practices found, from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act, to offer reinstate-

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17). The record does not disclose under what circumstances McAllister made the statement ascribed to him (Vol. I, 95; Vol. II, 21).

ment with back pay to Soriano, and to post appropriate notices (Vol. I, 98–100).

On February 12, 1943, petitioner filed in the court below a petition to review and set aside the Board's order (Vol. I, 1–12); the Board answered, requesting enforcement (Vol. I, 13–18). On July 9, 1943, the court handed down its opinion (Vol. I, 104–113), and on August 9, 1943, entered its decree (Vol. I, 114–116), enforcing the Board's order in full.

ARGUMENT

Petitioner's contention (Pet. 9–13, 16) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 3–6) affords full support for the challenged findings, as the court below held (Vol. I, 113).

In respect to the contention (Pet. 3–8) that there was a fatal variance between the pleadings and the proof relating to the discrimination against Soriano, the record discloses that at no time during the hearing was there any misunderstanding as to the basis of the Board's complaint, and that all parties to the proceeding knew from the outset that the essence of the complaint was the discrimination against Soriano because of his affiliation with the Union. In fact, nowhere does petitioner assert that such alleged variance resulted in any detriment or disadvantage to it in

meeting the issues. In these circumstances, petitioner's contentions raise no issue reviewable here. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349–351; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 431–432.

CONCLUSION

The decision below, sustaining the Board's order, is correct, and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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OCTOBER 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

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